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No. -

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1984

JOHN H. STEWART,
Petitioner,

VS.

DISNEYLAND, DIVISION OF WALT DISNEY PRODUCTIONS:
and, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA,
LOCAL 235,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit misapplied the law concerning the date of accrual of plaintiff's claim for discrimination for purposes of timely filing his charge of discrimination against respondents, to the uncontroverted facts of Petitioner's late discovery of his claim.

2. Whether the Ninth Circuit failed to follow the guidelines governing the Petitioner's initial burden of proof under Title VII of the Civil Rights Act, including whether the Court failed completely to consider Petitioner's overwhelming evidence of rebuttal of Respondent's evidence, including admitted and uncontroverted facts and documents demonstrating pretext, as well as admitted and uncontroverted evidence that plaintiff had retained 12 years of seniority instead of less than 2 years service seniority at the time of his layoff.

3. Whether the Ninth Circuit failed to follow the directives of this Court concerning review of the granting of a Motion for Summary Judgment under Rule 56, Federal Rules of Civil Procedure.

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PETITION FOR WRIT OF CERTIORARI

To: Honorable Justices of the U.S. Supreme Court

INTRODUCTION

Pursuant to 28 U.S.C. § 2101(c) and Rule 20, U.S. Supreme Court Rules, Petitioner John H. Stewart hereby files this Petition for issuance of a writ of certiorari on the following grounds:

a. That the Memorandum Opinion issued by the Ninth Circuit Court of Appeals on September 6, 1984 varies from and deviates from the standards depicting

delayed accrual of a claim for discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. as set by the Supreme Court in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

b. That said Memorandum Opinion varies from and deviates from the standards setting forth plaintiff's burden of proof in Title VII cases as set forth in *Furnco Construction Co. v. Waters* 438 U.S. 567 (1978).

c. The Ninth Circuit failed completely to resolve disputed facts in favor of Petitioner below, deviating from this Court's rules describing the appellate Court's standard of review of the granting of a Motion for Summary Judgment. *U.S. v. Diebold, Inc.*, 369 U.S. 654 (1962).

OPINION BELOW

The Opinion of the Ninth Circuit Court of Appeals was not reported. The Findings of Fact, Conclusions of Law and Judgment of the District Court, Central District of California, which were later amended upon limited remand, were also not reported.

JURISDICTION OF THIS COURT AND COURTS BELOW

The Memorandum Opinion of the Ninth Circuit affirming the District Court's grant of Summary Judgment to Respondents was entered on September 6, 1984. (Appendix A). Petitioner filed a timely Petition for Rehearing En Banc, which was denied pursuant to the Ninth Circuit's Order entered November 6, 1984. (Appendix B).

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 2101(c) and Rule 20.4, Supreme Court Rules, 28 U.S.C.

The jurisdiction of the lower Federal courts was as follows: District Court Jurisdiction was invoked under 42

U.S.C. § 2000e-5 and 28 U.S.C. § 1343(4). The Jurisdiction of the Ninth Circuit Court of Appeals was perfected by the timely filing of a Notice of Appeal on June 21, 1982 from the Order of the District Court granting Respondent's Motions for Summary Judgment, which was entered on May 24, 1982.

STATUTES INVOLVED

This case involves the scope of the standard of review of evidence on an appeal from a Motion for Summary Judgment, and to what extent are the Courts of Appeal required to resolve inferences of fact in favor of the opposing party. Rule 56, Federal Rules of Civil Procedure 28 U.S.C., is set forth in full as Appendix C hereto.

STATEMENT OF THE CASE

Petitioner STEWART, a black U.S. citizen, was continuously employed by Respondent DISNEYLAND, DIVISION OF WALT DISNEY PRODUCTIONS, INC. (hereinafter referred to as "DISNEYLAND") at from on or about June 27, 1959, through January 13, 1973, about thirteen and one-half years. Petitioner was initially hired as a janitor in 1959. At that time, Petitioner was the first black in his position allowed to work day shift at DISNEYLAND'S Anaheim amusement park (hereafter "Park") on a permanent basis. JOHN STEWART was employed as a janitor and later janitor foreman between June, 1959, and March 28, 1971. During the time he was a janitor, STEWART was a member of the Services and Hospital Employee International Union, Local 399. Beginning in or about late 1969, or early 1970, STEWART began talking to various persons in DISNEYLAND'S management about transferring into the Park's Maintenance Division. He was interested in transferring into the group designated Service Garage/Service Station, also known as the "Oilers". The Oilers were under the jurisdiction of Respondent LOCAL 235, INTERNA-

TIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, (succeeded herein by GENERAL TRUCK DRIVERS, OFFICE, FOOD and WAREHOUSE LOCAL 952). STEWART'S stated purposes for the transfer to the Oilers were because of perceived better wages, and also to become a participant in the DISNEYLAND Employee Pension Plan which at the time did not include janitors. In or about March 1971, STEWART talked to the following persons among others in DISNEYLAND'S management with a view towards obtaining a transfer into the Maintenance Division: RICHARD A. ("DICK") NUNIS, Vice President of Operations of DISNEYLAND and WALT DISNEY WORLD; and ED MACKE, Senior Personnel Representative. In about March, 1971, and prior to his transfer, ED MACKE informed Plaintiff, who understood and agreed, that upon his transfer into the Oilers of the Maintenance Division, his union seniority would start anew, however, his long term employment seniority with DISNEYLAND would remain the same. MACKE later memorialized this discussion and agreement in a corporate document, which was admitted by DISNEYLAND and filed with the District Court. Petitioner was informed and believed that in fact his years of service as a janitor were credited to obtain eligibility for participation in DISNEYLAND'S Pension Plan upon his transfer. Petitioner's transfer into the Oilers of the Maintenance Division occurred on or about March 28, 1971. At the time, STEWART became only the second black to ever work in DISNEYLAND'S Park's Maintenance Division. At all relevant times, that Division employed over 500 union employees of various trades in its Maintenance Division.

As an Oiler, STEWART came under the supervision of DISNEYLAND'S Supervisor and later Superintendent of that section, JAMES COYNE. COYNE supervised 35 to

40 employees in the Service Garage/Service Station. Petitioner was part of the crew led by foreman RAY PITTMAN. As an Oiler, Petitioner's duties consisted, inter alia, of: care by oiling and lubrication of moving parts of mechanical and electrical equipment on DISNEYLAND park rides, vehicles, and other equipment at the amusement park, and supplying natural gas to certain park boats, rides and vehicles, and substitution for other oilers/truck drivers when appropriate. Petitioner was the only black in this job classification, which consisted of approximately 14 or 15 employees on his shift, the third shift, which was supervised by foreman RAY PITTMAN. Petitioner won the respect of his foreman, and his crew, and was eventually elected shop steward on or about November 17, 1972. The evidence below is not contradicted that Petitioner's election to shop steward was the first time a black person had ever been elected shop steward in DISNEYLAND'S Maintenance Section. As shop steward, Petitioner's duties required an adversarial relationship with JAMES COYNE, superintendent of the Service Garage/Service Station over labor problems and working conditions.

Within about one month of becoming shop steward, and after three grievance-type meetings with Superintendent COYNE, STEWART was informed by COYNE in December, 1972, that he would be laid off effective January 13, 1973, due to an "economic cutback" in the Maintenance Division.

At the time he was laid off, STEWART was one of the two most junior Service Station employees affected, out of eight or nine from the entire Maintenance Department. However, Petitioner was the only black and only permanent employee laid off during the economic cutback of December, 1972. All other employees affected were seasonal temporary hires, or probationary employees who did

not survive their probation period. STEWART had more than fourteen months job classification seniority, and over twelve years overall DISNEYLAND service seniority than any employee laid off at the time.

After his layoff, and throughout 1973 and 1974, STEWART consistently and repeatedly sought to ascertain the economic status of the cutback from various persons and officers at DISNEYLAND, and sought recall and/or rehire to his former position. Petitioner telephoned and/or spoke to Superintendent COYNE, among others, in the summers of 1973 and 1974, and as late as September, 1974, seeking information and requesting employment at those peak periods when the amusement park operated on a seven-day, 17 hour schedule. In response to all of his inquiries to COYNE, Petitioner was told that the economic cutback which caused his layoff was still in effect, and that there was no work.

During 1973 and 1974, and unknown to STEWART until 1979, STEWART'S foreman, RAY PITTMAN, made several direct requests to Superintendent COYNE to add new personnel to the Oilers, in anticipation of the peak tourist periods at the amusement park. PITTMAN testified by Affidavit and Deposition that in response to PITTMAN'S pleading for more personnel, COYNE stated "Ray, I can't hire anyone for at least a year. If I do, I have to bring JOHN STEWART back." (The one year reference was to the recall rights of laid-off employees under DISNEYLAND'S Maintenance Agreement with the trades).

On or about October 28, 1974, a white male was transferred or hired to Petitioner's former job. Petitioner found out within one or two days thereafter.

STEWART retained membership in Respondent TEAMSTERS LOCAL 235 throughout 1973 and 1974. After his layoff from DISNEYLAND, STEWART registered with

the union and sought referrals to DISNEYLAND during those years. Petitioner made known his preference to return to DISNEYLAND. LOCAL 235, through its General Secretary and later President, KELLY DRAKE, agreed to refer Petitioner for work, but never referred Petitioner for work at DISNEYLAND or any other employer in that period. STEWART, upon finding out in late October, 1974, that a new white male employee was hired by DISNEYLAND, complained to President KELLY DRAKE of LOCAL 235 about the new hire to his former position. Petitioner contends that LOCAL 235 thereafter did not return his calls, and did nothing concerning his complaints.

Petitioner filed his charge of discrimination against both Respondents with the Los Angeles District Office of the Equal Employment Opportunity Commission ("EEOC") on January 31, 1975, within 300 days of his replacement by a white male on October 28, 1974. On February 3, 1976, the EEOC issued a 27-page Determination finding that Petitioner had been discriminated against by both Respondents. The EEOC Determination was authenticated by the Director of the Los Angeles District Office of the EEOC, and filed by Petitioner in the District Court on August 7, 1981 as evidence in opposition to Respondents' First Motion for Summary Judgment.

Petitioner filed this action in the District Court, Central District of California on October 21, 1980. Respondents filed two motions for Summary Judgment. The first motions were denied without prejudice, pending further discovery. Respondents' Second Motions for Summary Judgment were granted, and Judgment thereon was entered May 24, 1982, on the grounds that Petitioner's filing of his charge of discrimination with the EEOC was untimely, and that Petitioner never proved a prima facie case anyway. Notice of Appeal was filed June 21, 1982.

ARGUMENT.

I

THE NINTH CIRCUIT MISAPPLIED THE LAW CONCERNING ACCRUAL OF PETITIONER'S CLAIM OF DISCRIMINATION

The Ninth Circuit apparently overlooked the late accrual and discovery theories of limitations as applied to discovery of discrimination claims, as enunciated by *Zipes v. Trans World Airlines,* 455 U.S. 385, 393 (1982) and developed in *Calhoun v. Alabama Alcoholic Beverage Control Board,* 705 F.2d 422 (11th Cir. 1983). See, Appendix A hereto, pages 3-5. Petitioner did not know, and could not have discovered that he had a claim of discrimination until on or about October 28, 1974, when he was replaced by a white male with lesser seniority. Appellant's claim of discrimination was filed January 31, 1975, within 300 days of this discovery.

The burden is on the petitioner to prove conditions establishing waiver, estoppel, or equitable tolling of the time requirements set forth in 42 U.S.C. §2000e-5(c). *Cooper v. Bell,* 628 F.2d 1208, 1214 ftn. 11 (9th Cir. 1980).

Petitioner alleged conditions of tolling in his Complaint at paragraphs 8, 9 and 10. Appendix to Opening Brief at pp. 8-10.[1]

Petitioner demonstrated by overwhelming and uncontroverted evidence filed below that Respondents DISNEYLAND and LOCAL 952 (through its predecessor, LOCAL 235), suppressed and concealed material facts concerning the true nature of the "economic cutback" and actively misled Petitioner concerning the existence of work in his former job unit. See, STEWART Deposition at pp. 35-40, and

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[1]References herein to the Appendix to Opening Brief and Clerk's Transcript are made to those documents as filed with the Ninth Circuit. Petitioner has requested certification and transmittal of those records to this Court for consideration with this Petition.

Clerk's Transcript No. 48 STEWART Affidavit, ¶6, ¶7, and ¶8, Appendix to Opening Brief at pp. 127-131. Two DISNEYLAND foremen of long standing, RAY PITTMAN and S. F. VAN VALKENBURG confirmed Petitioner's efforts to diligently inquire about work availability, and his lack of knowledge concerning anything untoward about his layoff or non-rehire. See Affidavit of RAY PITTMAN, Appendix to Opening Brief at pp. 132-135; Deposition of RAY PITTMAN at pp. 63-72, Clerk's Transcript No. 50; Affidavit and Supplemental Affidavit of S. F. VAN VALKENBURG, Appendix to Opening Brief at pp. 136-137 and pp. 247-249, Clerk's Transcript, Nos. 23 and 42.

Petitioner testified in his deposition that the transfer of a white male into his former position in October, 1974, was the first time he realized that he may have been the object of illegal discrimination. STEWART Deposition at pp. 45-55, Clerk's Transcript No. 48.

In *Calhoun v. Alabama Beverage Control Board,* 705 F.2d 422 (11th Cir. 1983), black plaintiffs sought a liquor license to operate a social club in a white area. In or about June, 1979, that license was denied. Plaintiffs were informed that the license denial was due to community protest. However, *over two years later,* a license was granted to white applicants for the same location. Upon finding out, plaintiffs commenced their action against the Beverage Control Board, alleging discriminatory denial of their license. The District Court ruled in favor of defendant's motion for summary judgment on the grounds that the action was untimely. The Court of Appeals reversed the District Court on the grounds that plaintiffs could not have discovered facts constituting their claim prior to the license grant to the white applicants.

Where a plaintiff has been laid off, and has been replaced after his time limit for filing a charge of discrimination has expired, which replacement gives plaintiff first notice of his

claim, courts have held that the filing period does not commence until a diligent plaintiff has discovered the facts giving rise to this claim. *Smith v. Rexall Drug Co.*, 415 F.Supp. 581 (E.D. Mo.), *aff'd*, 598 F.2d 829 (8th Cir. 1976); *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975).

> "Secret preferences in hiring and even more subtle means of illegal discrimination, because of their very nature, are unlikely to be readily apparent to the individual discriminated against. Indeed, employers that discriminate undoubtedly often attempt to cloak their policies with a semblance of rationality, and may seek to convey to the victim of their policies an air of neutrality or even sympathy. These tendencies may even extend to the giving of misleading or false information to the victim. . ." *Reeb, id.*, at p. 931.

Petitioner filed his charge of discrimination with the EEOC on January 31, 1975, within 300 days of first learning of the transfer of a white male into his former position and union. Petitioner timely filed his charge of discrimination, or at the very least, demonstrated triable issues of material facts concerning the timeliness of his charge.

II

THE NINTH CIRCUIT FAILED TO FOLLOW THE SUPREME COURT'S GUIDELINES GOVERNING THE BURDEN OF PROOF IN TITLE VII CASES, BY FAILING TO CONSIDER AT ALL PETITIONER'S EVIDENCE OF THE PRETEXTUAL NATURE OF PLAINTIFF'S LAYOFF.

a. Petitioner Has Set Forth a Prima Facie Case of Disparate Treatment and Disparate Effect Against Both Respondents

The elements of a prima-facie case of disparate treatment are: 1. plaintiff is a member of a racial minority;

2. plaintiff was qualified for the job he was performing; 3. plaintiff was satisfying the normal requirements of his work; 4. plaintiff was discharged; 5. after plaintiff's discharge, the employer and/or union assigned white employees to perform the same work. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Flowers v. Crouch-Walker*, 552 F.2d 1277, 1282-1283 (7th Cir. 1977). A prima facie case raises an inference of discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

Petitioner proved below:

1. He was black. STEWART Declaration at ¶2, Appendix to Opening Brief at pp. 242-246; Complaint at ¶4; Answer at ¶4, See Appendix to Opening Brief at pp. 6-18.

2 and 3. He was continuously employed by DISNEYLAND for thirteen and one-half years, transferred to another division, and was elected shop steward by coworkers. See, STEWART Declaration, ¶2 thru ¶6, Appendix to Opening Brief at pp. 243-244.

4. He was laid off on January 13, 1973, and not recalled within one year recall right period under Collective Bargaining Agreement. See, Answers of Respondents, Appendix to Opening Brief at pp. 13-24.

5. He was replaced by a white male, COYNE Affidavit, Appendix to Opening Brief at pp. 171, 233.

Petitioner also proved superintendent COYNE's discriminatory animus against him as an employee shop steward. COYNE told foreman PITTMAN after STEWART was laid off, and *during* STEWART's one-year recall period, that no new men would be hired for at least a year to avoid bringing STEWART back. PITTMAN Deposition, at pp. 55-58, 86, Clerk's Transcript No. 50; PITTMAN Affidavit, Appendix to Opening Brief at pp. 132-135.

COYNE's authority to hire is fully described in the record. See, Sec. III A 1-6, of Petitioner's Opening Brief to the Ninth Circuit. COYNE's dislike for STEWART is apparent throughout his Affidavit. Appendix to Opening Brief at pp. 169-171, and pp. 231-233.

The disparate effect theory applies to neutrally applied job actions which tend to have a disproportionate effect upon minority employees. A prima facie case is shown where a neutral job action or procedure excluded black individuals at a rate significantly greater than white individuals, and that plaintiff was excluded by that procedure. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Adams v. Gaudet*, 515 F.Supp. 1086, 1125 (W.D. La. 1981).

Petitioner demonstrates disparate effect by his evidence concerning the economic layoff. See, *infra.*

The case of *Flowers v. Crouch Walker, supra*, is factually on point, and should guide this Court's determination of the sufficiency of Petitioner's evidence below. On DISNEYLAND'S liability for the acts of COYNE, See *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979).

Petitioner's case and proof against Respondent LOCAL 952 is discussed at Appendix to Opening Brief, pp. 252-259.

b. Petitioner Rebutted Respondent's Defense of Economic Cutback As the Reason for His Layoff As Pretextual

Respondents argued below that Petitioner: 1. was laid off pursuant to an economic cutback; 2. had recall rights for one year under a collective bargaining agreement; and 3. was not recalled during the recall period, and there was no desire to recall him thereafter. DISNEYLAND and LOCAL 952's Motion for Summary Judgment, Appendix to Opening Brief at pp. 25-112.

1. Petitioner proved below that the economic cutback applied only to seasonal, non-permanent employees, and

was a sham devised by COYNE to get rid of Petitioner. Appendix to Opening Brief at pp. 237-240.

2. Petitioner proved, and DISNEYLAND admitted, a corporate memorandum of agreement whereunder Petitioner was to retain his company seniority since 1959 upon his transfer to the Maintenance Department. Appendix to Opening Brief at p. 236.

3. The failure to recall Petitioner was due to the discriminatory animus of COYNE, both during and after the recall period.

4. Respondent LOCAL 235 (now LOCAL 952) aided and abetted DISNEYLAND'S discrimination against Petitioner by not referring him for work after agreeing to do so, and by admitting to membership and referring a white male to Petitioner's former position.

c. Petitioner's Evidence of Pretext Was Ignored By the Ninth Circuit and the District Court

Had Petitioner's twelve (12) years of accrued Company seniority been applied and honored by DISNEYLAND, he would have had over 13 and ½ years seniority at the time of the "economic cutback" which caused his layoff, and would not have been affected by it. Even if the Court disagrees with Petitioner's contentions of accrued seniority, there was still substantial evidence that the Appellant's layoff was pretextual and discriminatorily applied to him. The principal arguments are contained in Appellant's Opening Brief to the Ninth Circuit at Section III A (4), pages 11 to 14. Most significant of these facts are: a. plaintiff was the only permanent employee laid off; b. no white permanent employees were laid off; c. even with abbreviated seniority from the time of his transfer to the new job classification, Petitioner had more seniority than 80 of 500 permanent employees who were *retained* by Disneyland, many in departments significantly more over

budget than Petitioner's department, which was not over budget at the time Petitioner was laid off; d. the corporate documents which Respondent Disneyland contended supported the layoff as applied to Petitioner, in fact only ordered reduction of employees hired in the immediate prior fiscal year — long after plaintiff had transferred to his new job classification.

Petitioner should have been allowed to go to trial on the issue of pretext. He was not.

III

THE NINTH CIRCUIT AND THE DISTRICT COURT BEFORE IT FAILED TO RESOLVE ALL DISPUTED CONTENTIONS OF FACT IN FAVOR OF PETITIONER.

The standard applied to the Circuit Court in reviewing the record on appeal from the granting of a motion for summary judgment is whether, in viewing the evidence and inferences therefrom in the light most favorable to the opposing party, the movant is entitled to summary judgment as a matter of law. *Carter v. Stanton,* 405 U.S. 669, 671 (1972); *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962).

The Ninth Circuit and the District Court before it did not resolve any disputed facts in favor of Petitioner, ignored Petitioner's overwhelming evidence of pretext, and even found against Petitioner on admitted facts and documents concerning Petitioner's retained seniority, and found against Petitioner's uncontroverted facts concerning late discovery and/or late accrual of his claim for discrimination.

CONCLUSIONS

By reason of the foregoing, Petitioner hereby requests that this Court issue its Writ of Certiorari to the Ninth Circuit Court of Appeals, and that this Court reverse the Memorandum Opinion of the Ninth Circuit, and remand with instructions to send this matter back to the District Court, Central District of California for trial on the merits.

Respectfully submitted

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APPENDIX A

No. 82-5608

D.C. No. CV 80-4637-CBM

In the United States Court of Appeals, For The Ninth Circuit, JOHN H. STEWART, Plaintiff/Appellant, vs. Disneyland, Division of Walt Disney Productions; and International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America, Local 235, Defendants/Appellees.

On Appeal from the United States District Court for the Central District of California, The Honorable Consuelo B. Marshall, District Judge, Presiding. Argued and submitted July 2, 1984.

*Before: ANDERSON and FERGUSON, Circuit Judges, and SOLOMON,** District Judge.*

John H. Stewart appeals from a grant of summary judgment to Disneyland and Local 235, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America (Teamsters), in an action alleging discrimination under Title VII of the Civil Rights Act of 1964. We affirm.

BACKGROUND

John Stewart, a black man, began working for Disneyland in June, 1959, as a janitor. In March, 1971, he transferred to an oiler-truck driver position. Upon transferring, Stewart gave up the seniority he gained as a janitor and

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

**The Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

acquired a new job classification seniority date. Before this transfer, Stewart had been informed that he would begin with a new seniority date. Pursuant to a collective bargaining maintenance agreement, job classification seniority governed transfers, promotions, layoffs, and recalls.

On January 13, 1973, Stewart was laid off, ostensibly due to an economic cutback. Pursuant to the maintenance agreement, an employee on layoff has a right to recall for a period of up to one year from the date of layoff. Stewart was not recalled and his recall rights terminated on January 13, 1974. On October 29, 1974, Eugene Rucinski, a white man, was transferred into the position of oiler-truck driver from another division.

On January 31, 1975, Stewart filed a charge of discrimination under Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission (EEOC). He received a notice of right to sue on July 28, 1980, and filed a complaint in the district court on October 21, 1980. Defendants' first motion for summary judgment was denied to allow Stewart more time to discover facts supportive of his allegations. On May 24, 1982, the district court granted defendants' second motion for summary judgment. After Stewart obtained a limited remand from the circuit court, the district court revised its findings and entered judgment in favor of defendants on July 28, 1983.

STANDARD OF REVIEW

The standard of review on summary judgment is de novo, to determine whether any genuine issue of material fact exists. *Amaro v. The Continental Can Company*, 724 F.2d 747, 749 (9th Cir. 1984). If no genuine issue of material fact exists, judgment is appropriate as a matter of law. *Yazzie v. Olney, Levy, Kaplan & Tenner*, 593 F.2d 100, 102 (9th Cir. 1979).

TIMELY FILING REQUIREMENT

In a state with its own fair employment laws, like California, a Title VII complaint must be filed with the EEOC within 300 days after an alleged unlawful employment practice has occurred, or within 30 days after receiving notice that the state or local agency with jurisdiction over such matters has terminated its proceedings, whichever is earlier. Section 706(c) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c). Pursuant to a waiver policy followed by the EEOC and the state agency, deferral to the state agency was waived in this case. Stewart submitted his complaint to the EEOC, and it was deemed filed, on January 31, 1975.

To be timely, Stewart must have filed his charge with the EEOC within 300 days of the acts of which he complains. 42 U.S.C. § 2000e-5(c); *Mohasco Corp. v. Silver,* 447 U.S. 807, 817 (1980). Stewart's filing with the EEOC on January 31, 1975, was more than 300 days after his layoff on January 13, 1973, and more than 300 days after January 13, 1974, the date on which Stewart's recall rights expired. Unless exceptional circumstances exist, Stewart's complaint was untimely under 42 U.S.C. § 2000e-5(c).

TOLLING

The time limitation for filing a charge of discrimination with the EEOC is, like a statute of limitations, subject to waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines,* 455 U.S. 385, 393 (1982). The burden of establishing that waiver, estoppel, or equitable tolling excuse the failure to comply with the time requirements set forth in 42 U.S.C. § 2000e-5(c) is on the plaintiff. *Cooper v. Bell,* 628 F.2d 1208, 1214 n.11 (9th Cir. 1980).

In support of tolling, Stewart argues that Disneyland concealed material facts concerning the true reasons for his layoff and actively misled him concerning the existence of work for his recall. As a matter of law, the evidence

submitted by Stewart does not establish that his delay in filing was due to fraudulent concealment or misrepresentation on the part of the defendants as to his layoff and non-recall. The evidence fails to show that plaintiff's layoff and subsequent failure to be recalled were racially motivated, or for any reason other than an economic cutback.

Stewart further argues that where a plaintiff has been laid off, and has been replaced after his time limit for filing a charge of discrimination has expired, which replacement gives plaintiff first notice of his claim, the filing period does not commence until a diligent plaintiff has discovered that fact which gives rise to his claim. See *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975). The evidence which showed that a white employee was transferred temporarily from another division to an oiler-truck driver position to replace an employee on medical leave, nine months after Stewart's right to recall had expired, does not indicate that Stewart was the object of discriminatory conduct nor does it show that defendants' actions were racially motivated, and thus does not provide facts giving rise to his claim.

The evidence submitted by Stewart does not establish any justification for equitable extension of the Title VII filing period. Therefore, tolling is inappropriate and Stewart has failed to comply with a statutory prerequisite to the maintenance of a civil action under Title VII of the Civil Rights Act of 1964.

AFFIRMED.

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit.

JOHN H. STEWART, Plaintiff/Appellant, vs. DISNEYLAND, DIVISION OF WALT DISNEY PRODUCTIONS; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, LOCAL 235, Defendants/Appellees.

No. 82-5608

D.C. No. CV 80-4637-CBM

Before: *ANDERSON and FERGUSON, Circuit Judges, and SOLOMON,* District Judge.*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*The Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

APPENDIX C

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without sub-

stantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented

in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

Office - Supreme Court, U.S.
FILED
MAR 16 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1275

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1984

JOHN H. STEWART,
Petitioner,

VS.

DISNEYLAND, DIVISION OF WALT DISNEY PRODUCTIONS,
and, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA,
LOCAL 235,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX D

Findings of Fact and Conclusions of Law re Defendants' Motions for Summary Judgment.

CASE NO. CV 80-4637CBM(Mx)

Filed July 20, 1983, Clerk, U.S. District Court, Central District of California. Entered July 26, 1983, Clerk, U.S. District Court, Central District of California.

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, JOHN H. STEWART, Plaintiff, vs. DISNEYLAND, A Division of Walt Disney Productions, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 235, Defendants.

This action having come on for hearing before the Court on defendants' Motions for Summary Judgment, the Honorable Consuelo B. Marshall, Judge, presiding, on April 5, 1982, and the Court, having considered the papers that have been submitted by the parties, and having heard the oral arguments of counsel, makes its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff John H. Stewart is a resident of California and a former employee of defendant Disneyland.

2. Defendant Disneyland is a division of Walt Disney Productions, a corporation doing business in California.

3. Defendant General Truck Drivers, Office, Food and Warehouse Workers, Local 952, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, is the successor union ot the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, Local 235 ("Local 235") and is a labor organization.

4. On June 27, 1959, plaintiff was hired by defendant Disneyland as a janitor. While holding this position, plaintiff was subject to the collective bargaining agreement, commonly referred to as the Building Service Agreement, between Disneyland and the Service and Hospital Employees International Union, Local 399.

5. On March 28, 1971, plaintiff transferred at his own request to the position of Oiler-Truck Driver, a position which fell under the jurisdiction of Local 235. While in this position, plaintiff was subject to the terms and conditions of employment, including "seniority," "layoff" and "recall," set forth in the collective bargaining agreement, commonly referred to as the Maintenance Agreement, between Disneyland and the Building and Construction Trades Council of Orange County and individual signatory District Councils of local unions, including Local 235.

6. Prior to his transfer, plaintiff was on notice that such transfer would require the forfeiture of his accrued classification seniority under the Building Service Agreement, and henceforth his new classification seniority date under the Maintenance Agreement would be March 28, 1971, the date of the transfer. Under the Maintenance Agreement to which plaintiff was then subject, classification seniority governed promotion, transfer, layoff and recall.

7. Between October 1972 and January 1973, defendant Disneyland laid off certain employees pursuant to an economic cutback dictated by budget restrictions.

8. Plaintiff was laid off from the position of Oiler-Truck Driver on January 13, 1973, pursuant to the economic cutback.

9. Each of the employees laid off pursuant to the economic cutback, including plaintiff, was, at the time of said layoffs, the least senior employee in his respective classification.

10. Under the Maintenance Agreement, an employee on layoff had a "right to recall" for a period of up to one year from the date of layoff. That right required that employees on layoff would be hired in order of seniority into the position from which they had been laid off, if such position or positions became available within one year. If an employee was not recalled during that period, his recall rights were automatically terminated.

11. During the one year period following plaintiff's layoff, neither plaintiff nor any other employee was hired or recalled into the position of Oiler-Truck Driver, because no such positions became available during that period.

12. Although plaintiff made sporadic telephone inquiries to his former supervisor about the possibility of reemployment both while subject to recall and after his recall rights had expired, he was not led to believe that he had a reasonable expectation of reemployment. Upon each inquiry, plaintiff was truthfully informed that no Oiler-Truck Driver positions were available and that there were no plans to expand the number of positions.

13. Plaintiff's last inquiry about reemployment was made no later than September 1974. At that time, no Oiler-Truck Driver positions were available.

14. The first Oiler-Truck Driver position became available on October 28, 1974, 21 months after plaintiff was laid off and nine months after his recall rights under the Maintenance Agreement had terminated. The position became available because an Oiler-Truck Driver went on extended medical leave, and was filled by the transfer of a current Disneyland employee.

15. Subsequent to the termination of his recall rights, plaintiff never submitted a written application for employment.

16. Nothing about the transfer of a current Disneyland employee to replace an Oiler-Truck Driver in October 1974 suggests that the failure to recall plaintiff nine months after his recall rights had terminated, or at any earlier date, was discriminatory.

17. On January 31, 1975, 382 days after his recall rights had terminated, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC"), alleging that he was discriminatorily laid off and denied recall in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

18. Subsequently, the EEOC issued plaintiff a Right to Sue letter, and plaintiff filed a complaint in this court on October 21, 1980.

19. Defendant Disneyland has demonstrated by overwhelming evidence that plaintiff was laid off and not recalled during the period of his right to recall due to economic constraints rather than to racial discrimination. Plaintiff has not introduced any evidence that casts doubt upon the economic cause of his layoff and non-recall.

20. Defendant Disneyland has further demonstrated by evidence, that plaintiff did not apply for or inquire about rehire at a time when an Oiler-Truck Driver position was available or reasonably expected to be available and that the failure to rehire him was not due to racial discrimination.

21. Any Conclusion of law which properly should be a Finding of Fact, is included herein as a Finding of Fact as though fully set forth.

CONCLUSIONS OF LAW

1. This court possesses jurisdiction over the case at bar pursuant to 42 U.S.C. §§ 2000e-5(f)(1) and (2), and 28 U.S.C. § 1343(4).

2. Summary judgment is proper when the action embodies no genuine issue of material fact. The movant bears the burden of demonstrating the absence of any such genuine issue of material fact. Any doubt as to the existence of a genuine issue of material fact is resolved against the movant. *Adickes v. S. H. Kress & Company,* 398 U.S. 144, 90 S. Ct. 1598, 26 L.Ed. 2d 142 (1970). If, however, the "truth is clear", the movant is entitled to summary judgment. *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 82 S. Ct. 486, 7 L.Ed. 2d 458 (1962).

3. Defendant Disneyland has demonstrated by overwhelming evidence that plaintiff was laid off and not recalled during the period of his right to recall because of budget constraints. Plaintiff has failed to introduce any evidence that casts doubt upon the economic cause of his layoff and non-recall. *See Wilkerson v. Siegfried Ins. Agency,* 683 F.2d 344 (10th Cir. 1982). Consequently, there exists no genuine issue of material fact regarding the cause of plaintiff's layoff and non-recall. Thus, summary judgment on the merits in Defendant Disneyland's favor is warranted with respect to plaintiff's layoff and rehire claim.

4. Defendants Disneyland and Local 235 moved for summary judgment on the ground that plaintiff did not file a timely charge of discrimination with the EEOC. To be timely, plaintiff must have filed his charge with the EEOC within 300 days of the act of which he complains. 42 U.S.C. § 2000e-5(e); *Delaware State College v. Ricks,* 449 U.S. 250 (1980); *Mohasco Corp. v. Silver,* 447 U.S. 807 (1980); *United Airlines, Inc. v. Evans,* 431 U.S. 553 (1977). This requirement, like a statute of limitations, is subject to waiver, estoppel and equitable tolling. *Zipes v. TWA,* 455 U.S. 385 (1982).

5. Plaintiff alleged in his EEOC charge that he had been laid off and then not recalled as a result of racial discrimination. That charge, filed 382 days after the termina-

tion of his recall rights, was untimely under 42 U.S.C. § 2000e-5(c).

6. The burden of establishing that waiver, estoppel, or equitable tolling excuse for failure to comply with the time requirements set forth in 42 U.S.C. § 2000e-5(c) is on the plaintiff. *Cooper v. Bell,* 628 F.2d 1208, 1214 n.11 (9th Cir. 1980). The circumstances in which such principles will be applied are restricted. *Electrical Workers v. Robbins and Myers, Inc.,* 429 U.S. 229 (1976); *Earnhardt v. Commonwealth of Puerto Rico,* 691 F.2d 69, 71 (1st Cir. 1982); *Cottrell v. Newspaper Agency Corp.,* 590 F.2d 836, 838 (10th Cir. 1979); *Smith v. American President Lines, Ltd.,* 571 F.2d 102, 109 (2d Cir. 1978); *Aljadir v. University of Pennsylvania,* 547 F.Supp. 667, 669 (E.D. Pa. 1982). The Ninth Circuit enumerated three instances where waiver of the filing period might be warranted. First, failure to comply may be justified if the plaintiff had neither official notice nor actual knowledge of the filing period; second, compliance may be excused on general equitable grounds involving conduct or misrepresentation by a third party; and finally, a plaintiff's failure to comply may be justified if he "was unaware that he was the object of the discriminatory conduct." *Villasenor v. Lockheed Aircraft Corp.,* 640 F.2d 207 (9th Cir. 1981); *Earnhardt v. Commonwealth of Puerto Rico, supra; Wilkerson v. Siegfried Insurance Agency,* 683 F.2d 344, 348 (10th Cir. 1982).

7. As a matter of law, the evidence submitted by plaintiff, does not establish that plaintiff had neither official notice nor actual knowledge of the filing period; secondly, the evidence does not establish that plaintiff's delay in filing resulted from some fraudulent concealment or misrepresentation on the part of the defendants; and third, the plaintiff has failed to show that he was misled as to the cause of his dismissal, moreover, the evidence fails to show that plaintiff's dismissal and subsequent failure to be recalled

were racially motivated. The evidence which showed that a white employee was hired nine months after plaintiff's right to recall had expired, does not indicate that plaintiff was the object of discriminatory conduct nor does it show that defendants' actions were racially motivated. The evidence which showed that a white employee was hired nine months after plaintiff's right to recall had expired, does not indicate that plaintiff was the object of discriminatory conduct nor does it show that defendants' actions were racially motivated.

Thus, as a matter of law, the evidence submitted by plaintiff does not establish any justification for equitable extension of the Title VII filing period. Therefore, tolling is inappropriate in this case.

8. Plaintiff's allegations of discriminatory layoff and failure to recall pertain to isolated and discrete acts and are not of a "continuing nature". *Ward v. Caulk,* 650 F.2d 1144, 1147 (9th Cir. 1981); *Griffin v. Pacific Maritime Association,* 478 F.2d 1118 (9th Cir. 1973), *cert. denied,* 414 U.S. 859 (1973).

9. Plaintiff's EEOC charge was untimely and thus plaintiff has failed to comply with a statutory prerequisite to the maintenance of a civil action under Title VII of the Civil Rights Act of 1964.

10. The fact that plaintiff made continuing efforts to be reemployed after the termination of his recall rights does not toll the statutory time period for filing a charge with the EEOC. *Anderson v. Paccar, Inc.,* 528 F.Supp. 181, 185 (M.D. Tenn. 1981), *citing Goldman v. Sears, Roebuck & Company,* 607 F.2d 1014 (1st Cir. 1979), *cert. denied,* 445 U.S. 929 (1980).

11. As a matter of law, plaintiff's assertion that he is entitled to litigate the question of whether the failure to rehire him after the termination of his recall rights was

discriminatory also must be rejected. That allegation was not made in the EEOC charge, and thus plaintiff has failed to comply with the statutory prerequisite to a suit under Title VII. *Anderson v. Paccar, Inc., supra.*

12. Furthermore, as a matter of law, plaintiff has failed to establish that the transfer of a current employee into the first Oiler-Truck Driver position which became open was an act of racial discrimination against plaintiff. Thus, summary judgment on the merits in favor of defendant is warranted with respect to plaintiff's failure to rehire claim.

13. Any Finding of Fact which properly should be a Conclusion of Law, is included herein as a Conclusion of Law as though fully set forth.

DATED: 7/20/83

CONSUELO B. MARSHALL, Judge
United States District Court

APPENDIX E

Judgment

CASE NO. CV 80-4637CBM(Mx)

Filed July 20, 1983, Clerk, U.S. District Court, Central District of California. Entered July 26, 1983, Clerk, U.S. District Court, Central District of California.

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA, JOHN H. STEWART, Plaintiff, vs. DISNEYLAND, A Division of Walt Disney Productions, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 235, Defendants.

The motions of Defendants DISNEYLAND and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 235 (hereinafter "Local 952") for summary judgment came on for hearing before the Honorable Consuelo B. Marshall, Judge, presiding, on April 5, 1982, Cynthia E. Gitt appearing for Defendant DISNEYLAND, Paul Crost for Defendant Local 952, and Edward E. Washington for Plaintiff John H. Stewart. Having reviewed the papers and documents in support of and in opposition to defendants' motions for summary judgment, and having heard argument on the matters, it appears that no material issue of fact exists in opposition to Defendants DISNEYLAND and Local 952's motions for summary judgment.

THEREFORE, IT IS HEREBY ORDERED that summary judgment be entered in favor of Defendants DISNEYLAND and Local 952 as to all causes of action against the moving defendants.

DATED: 7/20/83

CONSUELO B. MARSHALL, Judge
United States District Court

APPENDIX F

APPENDIX A

No. 82-5608

D.C. No. CV 80-4637-CBM

Filed September 6, 1984, Phillip B. Wineberry, Clerk, U.S. Court of Appeals.

In the United States Court of Appeals, For The Ninth Circuit, JOHN H. STEWART, Plaintiff/Appellant, vs. Disneyland, Division of Walt Disney Productions; and International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America, Local 235, Defendants/Appellees.

On Appeal from the United States District Court for the Central District of California, The Honorable Consuelo B. Marshall, District Judge, Presiding. Argued and submitted July 2, 1984.*

*Before: ANDERSON and FERGUSON, Circuit Judges, and SOLOMON,** District Judge.*

John H. Stewart appeals from a grant of summary judgment to Disneyland and Local 235, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America (Teamsters), in an action alleging discrimination under Title VII of the Civil Rights Act of 1964. We affirm.

BACKGROUND

John Stewart, a black man, began working for Disneyland in June, 1959, as a janitor. In March, 1971, he transferred to an oiler-truck driver position. Upon transferring, Stewart gave up the seniority he gained as a janitor and

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

**The Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

APPENDIX B

Filed November 6, 1984, Phillip B. Wineberry, Clerk, U.S. Court of Appeals.

In the United States Court of Appeals for the Ninth Circuit.

JOHN H. STEWART, Plaintiff/Appellant, vs. DISNEYLAND, DIVISION OF WALT DISNEY PRODUCTIONS; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, LOCAL 235, Defendants/Appellees.

No. 82-5608

D.C. No. CV 80-4637-CBM

Before: *ANDERSON and FERGUSON, Circuit Judges, and SOLOMON,* District Judge.*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*The Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.